

United States v. Tucker: The Sixth Circuit Takes Aim at Due Process

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I. INTRODUCTION

In a sparkling display of criminal ineptitude, a suspected drug dealer turned himself in without even realizing it. The bungling began when the witless outlaw misdialed the phone number of his alleged accomplice, choosing instead to leave a message detailing his whereabouts on the answering machine of a local police officer. He performed this fatal miscue several times on a machine whose recording clearly indicated that it belonged to a local police officer. His telephone finale involved his dialing the car phone of his alleged accomplice, only this time it was answered by police officers who listened to the doomed drug dealer describe his whereabouts.¹ Though refreshing, it is clear that most criminals are not as cooperative with their local police force.

Crimes on the order of drug trafficking, gambling, and prostitution, among others, involve "consensual" transactions. These transactions present special difficulties for police officers to detect because they are generally performed in private between willing participants who rarely complain to the police. In an era in which criminal justice legislation looks to impose itself on the private activities of American citizens with increasing frequency and moralistic altruism, the burden on law enforcement agencies grows accordingly.

In most jurisdictions, the police have accepted the challenge these clandestine crimes present by developing creative forms of detection. Law enforcement agencies frequently employ undercover agents and informants in their effort to expose consensual crimes. These agents seek to expose the criminals through an often complicated drama of bait and lure solicitation. These stratagems raise new questions in criminal law, including whether the person who was solicited would have, of their own free will, participated in the criminal offense absent the solicitation by the law enforcement agents. This question, in multiple forms, represents the core of the entrapment defense.

Malcolm X, a provocative voice in the battle for civil rights, was brutally assassinated in New York's Audubon Ballroom one frigid winter evening in 1965. As is generally the case, the assassins left indistinct trails, rendering the case unsolved thirty years later. A legacy from that period is the daughter of Malcolm X, Qubilah Bahiyah Shabazz, who has been forced to live each day among her father's suspected assassins—burdened with the memory of his

* The author wishes to thank the members of his family for their enduring support and encouragement.

¹ Lucy Howard & Carla Koehl, *Dumb and . . .*, NEWSWEEK, Jan. 16, 1995, at 6.

death. Imagine the anguish when, wholly unsolicited, one of her most admired friends offers her an opportunity for vengeance.² Certainly surprised, possibly taken aback, she concedes to listen to his plan. By listening, it could be argued that she has satisfied a deeply ingrained obligation to provide retribution for her slain father, without having previously or seriously considered its accomplishment. After all, this was a trusted friend who had approached her, not a bounty hunter off the set of a Martin Scorsese film. In a well conceived "sting" operation, Ms. Shabazz is arrested for conspiring to murder Louis Farrakhan, leader of the Nation of Islam and rumored conspirator in the assassination of Malcolm X. The legal questions automatically develop from this stage: What is the informant's relationship with the government? Was he paid for the information or in some way compensated for his actions? Assuming he is affiliated with the government, was Ms. Shabazz entrapped, were her due process rights infringed, or did his actions simply provide an innocent spark to a seething powder keg?

Courts have long recognized the need for a criminal defense that endeavors to draw a line "between the trap for the unwary innocent and the trap for the unwary criminal."³ Very quickly, the defense swept across the American legal system as the courts acknowledged that "[h]uman nature is frail enough at best, and requires no encouragement in wrong-doing."⁴

This Note will analyze the role the Constitution plays in the development of these defenses, paying particular attention to the "outrageous governmental conduct" defense of the Due Process Clause of the Fifth Amendment—a close relative of the entrapment defense. A recent Sixth Circuit decision⁵ has proclaimed the death knell of this "due process" defense, finding no constitutional foundation to support the defense.⁶ This Note will reveal the logical inconsistency of this decision and argue that the postulated demise of the due process defense is unjustified.

First, a foundation is laid through a detailed analysis of the entrapment defense by examining the debate embroiling both the subjective and objective applications of the defense. Although the subjective approach has been favored by the Supreme Court in these matters, a look to the recent decision of *Jacobson v. United States*⁷ will expose the inherent flaws of a strict adherence to the subjective methodology. Next, after developing a comparison of the

² Tom Morganthau, *Back in the Line of Fire*, NEWSWEEK, Jan. 23, 1995, at 20.

³ *Sherman v. United States*, 356 U.S. 369, 372 (1958) (Warren, C.J.).

⁴ *Saunders v. People*, 38 Mich. 218, 222 (1878) (Marston, J., concurring).

⁵ *United States v. Tucker*, 28 F.3d 1420 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1426 (1995).

⁶ *Id.* at 1424.

⁷ 503 U.S. 540 (1992).

outrageous governmental conduct defense to that of entrapment, this Note will explore the arguments used by the Sixth Circuit in *United States v. Tucker*⁸ in support of its decision to dismiss altogether the outrageous governmental conduct defense from Sixth Circuit consideration. This Note will follow this analysis by proposing new arguments which will warrant the constitutional integrity of the outrageous governmental conduct defense. Finally, this Note will look to the future of the American criminal justice system as incorporated with a valid due process defense.

II. DEVELOPMENT OF THE DOCTRINE OF ENTRAPMENT AS A VIABLE DEFENSE

A. *The Function of the Entrapment Defense*

The term "entrapment" brings to mind images of a wild fox or bear ensnared in a menacing, bonecrushing metal trap. For legal purposes, entrapment signifies "instigation of crime by officers of government."⁹ It has further been defined as "the inducement by government, of an individual to commit a criminal offense, not contemplated by him, for the purpose of prosecution."¹⁰ It seems clear that entrapment "occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials."¹¹

The absence of entrapment is not an element of the *prima facie* case of any crime. This defense is utilized as an affirmative defense, that is, one in which the alleged crime is excused due to some "compelling reason."¹² The compelling reason generally takes the form of an excuse or justification of that crime.¹³ Examples of other affirmative defenses include self-defense, insanity, and duress. It is important to keep in mind that while these may be effective in reducing the degree of the crime committed, they are not always effective in unconditionally absolving the defendant of responsibility. Because entrapment is difficult to comfortably identify with other forms of affirmative defenses, combined with the fact that this defense implicates the government—through its agents—in criminal activity, it is inherently a controversial proposition.

⁸ 28 F.3d 1420 (6th Cir. 1994).

⁹ *Sorrells v. United States*, 287 U.S. 435, 453 (1932) (Roberts, J., separate opinion).

¹⁰ *State v. Marquardt*, 89 A.2d 219, 221 (Conn. 1952).

¹¹ *Sherman v. United States*, 356 U.S. 369, 372 (1958) (quoting *Sorrells*, 287 U.S. at 451).

¹² See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.2, at 420-32 (2d ed. 1986) (discussing origins and scope of the defense).

¹³ *Id.*

B. *The Application of the Entrapment Defense: Subjective v. Objective Analysis*

The Supreme Court has been sharply divided in its attempt to identify a uniform criterion for application of the defense.¹⁴ The dispute arises from the inability of the Justices to agree on a proper controlling standard: The majority insists on a test which focuses on the predisposition of the defendant to commit the offense of which he stands charged (the subjective test),¹⁵ while a substantial minority contends that the test should concentrate solely on the conduct of the law enforcement agents (the objective test).¹⁶

The subjective approach, also known as the *Sorrells-Sherman* Doctrine¹⁷—advocated by a majority of the Supreme Court¹⁸—requires a two-pronged inquiry. In using such an analysis, the court would begin by assessing whether the government agents induced the defendant to commit the crime for which he is accused.¹⁹ If this assertion can be made, the court must then make a subjective examination of the defendant's predisposition to commit the offense.²⁰ Under the subjective test, if a finding of predisposition is made, the defense will fail,²¹ without regard to the degree of misconduct perpetrated by the government agents.²² The subjective analysis, as developed in *Sorrells v. United States*,²³ and reaffirmed in *Sherman v. United States*,²⁴ permits the application of the entrapment defense *only* when government agents induce otherwise innocent persons—both in mind as well as in action—to commit a crime.²⁵

Justification for the subjective approach finds its genesis in statutory principles. The basis of the defense is understood in terms of legislative intent

¹⁴ See, e.g., *Sherman*, 356 U.S. at 369; *Sorrells*, 287 U.S. at 435.

¹⁵ See, e.g., *Sherman*, 356 U.S. at 376-78; *Sorrells*, 287 U.S. at 451.

¹⁶ See *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (plurality opinion); *United States v. Russell*, 411 U.S. 423, 428-30 (1973).

¹⁷ Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1064 (Winter 1993).

¹⁸ *Sherman*, 356 U.S. at 369; *Sorrells*, 287 U.S. at 435.

¹⁹ *Sherman*, 356 U.S. at 371; *Sorrells*, 287 U.S. at 438.

²⁰ See also *Hampton*, 425 U.S. at 489-90; *Russell*, 411 U.S. at 435-36; *Sherman*, 356 U.S. at 371; *Sorrells*, 287 U.S. at 451-52.

²¹ *Sherman*, 356 U.S. at 371; *Sorrells*, 287 U.S. at 451-52.

²² *United States v. Rodriguez*, 433 F.2d 760, 761 (1st Cir. 1970), cert. denied sub nom. *Rodriguez v. United States*, 401 U.S. 943 (1971).

²³ 287 U.S. 435 (1932).

²⁴ 356 U.S. 369 (1958).

²⁵ *Sherman*, 356 U.S. at 372; *Sorrells*, 287 U.S. at 451.

underlying the particular statute alleged to have been violated.²⁶ The Court in *Sorrells* based its decision in part on the belief that the evidence supported the defendant's claim that he was not predisposed to commit the crime prior to his encounter with the police agents.²⁷ Without the required predisposition, the Court would not convict the defendant. The Court reasoned that it could not have been the intent of the Legislature to enforce the statute against "persons otherwise innocent in order to lure them to its commission and to punish them."²⁸

Under the subjective analysis, the focus of the inquiry will be on the character of the defendant and his predisposition to commit the crime in question, not on the offensive governmental conduct.²⁹ The subjective analysis provides two reasons to oppose the use of entrapment on the part of government officials: (1) criminal legislation is not targeted at nonpredisposed parties; and (2) it is not within the power of government officials to manufacture crime by involving otherwise innocent people in criminal activities.

The objective approach for entrapment, as surmised by Justice Roberts in *Sorrells*,³⁰ and by Justice Frankfurter in *Sherman*,³¹ rejects the legislative-intent rationale of the subjective analysis.³² These Justices proposed a test

²⁶ *Sherman*, 356 U.S. at 372.

²⁷ With regard to predisposition, the majority established that:

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.

Sorrells, 287 U.S. at 441.

²⁸ *Sorrells*, 287 U.S. at 449. In *Sherman*, Chief Justice Warren later clarified:

The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. . . . [T]he Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted.

Sherman, 356 U.S. at 376.

²⁹ See *Hampton v. United States*, 425 U.S. 484, 489-90 (1976); *United States v. Russell*, 411 U.S. 423, 435-36 (1973); *Sorrells*, 287 U.S. at 451-52.

³⁰ 287 U.S. at 453 (Roberts, J., separate opinion).

³¹ 356 U.S. at 378 (Frankfurter, J., concurring in the result).

³² *Id.*; *Sorrells*, 287 U.S. at 453.

which places emphasis on the extent of governmental misconduct as the focal point of its inquiry.³³ Justice Frankfurter observes in *Sherman* that a criminal statute is concerned exclusively with the definition and prohibition of certain conduct, not expressing prohibitive police conduct in the process of detecting crime.³⁴

Justice Frankfurter revealed other critical dangers of a subjective assessment. The *Federal Rules of Evidence* seek to protect the defendant from unnecessary exposure to juror prejudice.³⁵ Frankfurter notes that the government, in order to prove that it had not entrapped the accused, would be compelled to demonstrate a general predisposition on the part of the defendant "to commit, whenever the opportunity should arise, crimes of the kind solicited"³⁶

By the 1988 decision of *Mathews v. United States*,³⁷ the Supreme Court had clearly established its preference for the subjective approach to entrapment analysis. Justice Brennan, a stalwart proponent of an objective approach in earlier decisions,³⁸ retracted this earlier support in clear deference to the dominance of the Court's preference for subjective entrapment analysis.³⁹

³³ *Hampton*, 425 U.S. at 488-89; *Russell*, 411 U.S. at 428-30.

³⁴ Justice Frankfurter comments:

A false choice is put when it is said that either the defendant's conduct does not fall within the statute or he must be convicted. The statute is wholly directed to defining and prohibiting the substantive offense concerned and expresses no purpose, either permissive or prohibitory, regarding the police conduct that will be tolerated in the detection of crime. A statute prohibiting the sale of narcotics is as silent on the question of entrapment as it is on the admissibility of illegally obtained evidence. It is enacted, however, on the basis of certain presuppositions concerning the established legal order and the role of the courts within that system in formulating standards for the administration of criminal justice when Congress itself has not specifically legislated to that end.

Sherman, 356 U.S. at 381 (Frankfurter, J., concurring in the result).

³⁵ See, e.g., FED. R. EVID. 406 (discussing the admissibility of character evidence to prove the conduct of a person on a particular occasion).

³⁶ Justice Frankfurter continued: "The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt" *Sherman*, 356 U.S. at 382 (Frankfurter, J., concurring in the result).

³⁷ 485 U.S. 58 (1988).

³⁸ See *Russell*, 411 U.S. at 436; *Sherman*, 356 U.S. at 378.

³⁹ Justice Brennan conceded:

Were I judging on a clean slate, I would still be inclined to adopt the view that the entrapment defense should focus exclusively on the Government's conduct. But I am

It is clear that these distinct approaches may differ as much in result as in their theoretical underpinnings. Take, for example, a person X who is a student in a large university. X, short on funds for the semester, decides that he will take advantage of any opportunity that presents itself, legal or otherwise, which will help pay his bills. X is approached by an undercover agent who cautiously introduces him to the idea of distributing illegal narcotics. X is promised exorbitant profits and a minimum of vulnerability. X, though privately interested, hesitates for a number of days in order to ensure the deal's legitimacy. In the interim, the agent puts a tremendous amount of pressure on X to begin distribution by calling him frequently, leaving threatening notes, implying that X already knows too much about their operation to back out of the deal. When X complies, he is immediately arrested.

Under this scenario, an argument could be made against applying the entrapment defense under the subjective theory. Proponents of the subjective theory would argue that the defendant's predisposition to commit the illegal act burdens him with criminal liability, without regard to the aggressive methods of the police. Objective theory proponents would argue that the irrelevant issue is this very predisposition. Rather, the focus should be on the conduct of the police.⁴⁰ If the conduct is overbearing, the entrapment defense should provide an absolute defense.

Despite the above example, it is important to note that at its core, the difference between the subjective and objective tests for entrapment is one of theory. By creating a statutory premise for entrapment, we risk losing sight of the true function of the doctrine, which is to absolve an otherwise guilty individual who has been induced to commit a crime by law enforcement methods that are unacceptable.

III. OUTRAGEOUS GOVERNMENTAL CONDUCT AND THE DUE PROCESS DEFENSE

Little challenge can be made against the notion that the administration of criminal law is one of the government's most important, and potentially most intrusive powers. On this note, it is clear that each society must meet its responsibility in preventing the overextension of this power. American society has sought to meet these responsibilities by providing for an accusatorial

not writing on a clean slate; the Court has spoken definitively on this point. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court.

Mathews, 485 U.S. at 67 (Brennan, J., concurring).

⁴⁰ See *supra* notes 30–34 and accompanying text.

system premised on the presumption of innocence,⁴¹ the requirement of guilt beyond a reasonable doubt,⁴² and the requirement that the State shoulder the burden of proof.⁴³ The concept of substantive due process serves as the system's most important tool in the pursuit of equilibrium of power.

While providing a comprehensive system of personal liberties, due process seeks to determine what is "fundamentally fair" by scrutinizing all of the circumstances surrounding each event.⁴⁴ Implementation of due process principles requires freedom from arbitrary behavior and deceitful practices by the government.⁴⁵ The focus on individual rights is enhanced even more substantially when considering the individual with respect to criminal investigations. Due process serves as the counterbalance in this fertile ground for abuse, providing for a fair fight in the nation's courts.⁴⁶ From this point in the analysis, it seems a logical conclusion that due process would serve an equally crucial role in the enforcement division of the criminal justice system. The concept of due process adds the component of justice and fairness to criminal proceedings, even if those charged are predisposed to crime. Its protections extend beyond the subjective principles of entrapment, instead imposing a burden solely on the government to treat its citizens, irrespective of criminal propensity, guilt, or innocence, with dignity and fairness.⁴⁷

IV. A SEVERE CHALLENGE TO THE "OUTRAGEOUS GOVERNMENTAL CONDUCT" DEFENSE: *UNITED STATES V. TUCKER*

The United States Court of Appeals for the Sixth Circuit examined the outrageous governmental conduct defense most recently in its 1994 decision of *United States v. Tucker*.⁴⁸ In *Tucker*, the Sixth Circuit held that the government does not violate due process by inducing a predisposed defendant to commit an offense, regardless of whether the government's conduct is objectively outrageous.⁴⁹

⁴¹ See *Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978).

⁴² See *In re Winship*, 397 U.S. 358, 364 (1970).

⁴³ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

⁴⁴ See *Sherman*, 356 U.S. at 384-85 (Frankfurter, J., concurring in the result).

⁴⁵ *Rochin v. California*, 342 U.S. 165, 170-71 (1952).

⁴⁶ Edward G. Mascolo, *Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings*, 5 W. NEW ENG. L. REV. 601, 612-13 (1983).

⁴⁷ *Id.*

⁴⁸ 28 F.3d 1420 (6th Cir. 1994).

⁴⁹ *Id.* at 1426-27.

A. *The Facts*

Linda Hancock was hired by the United States Department of Agriculture to curb the preponderance of abuse to the federal food stamp system.⁵⁰ A “reverse sting”—a method of investigation in which “the police pose as sellers of [contraband], set up deals with would-be buyers under carefully controlled conditions, and arrest the purchasers following the sham sale”—was employed.⁵¹ In 1990, Hancock appealed to defendant Tucker, a friend of more than ten years, to help her escape dire financial problems.⁵² She proposed selling her family’s food stamps in order to provide a “proper Christmas” for her children.⁵³ At first Tucker resisted, however, she “finally purchased the stamps when Hancock later appeared at her beauty salon dressed in a manner suggesting her financial distress.”⁵⁴ Hancock asked Tucker for names of other people who might be interested in purchasing some stamps, to which Tucker replied by directing her to McDonald, one of Tucker’s employees.⁵⁵ McDonald also bought stamps from Hancock after listening to her tales of ill-health and financial distress.⁵⁶

B. *The Procedural History*

The government indicted Brenda Tucker and Barbara McDonald for purchasing and aiding and abetting the purchase of food stamps in violation of federal law.⁵⁷ The defendants moved to dismiss the indictment, claiming that the government’s conduct in inducing defendants to commit their crimes was so “outrageous” that it violated their due process rights.⁵⁸ Upon the recommendation of the magistrate, the district court dismissed the charges.⁵⁹ Upon appeal by the Government, the Sixth Circuit Court of Appeals reviewed this decision de novo.⁶⁰

⁵⁰ *Id.* at 1421.

⁵¹ *Id.* (alteration in original).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (charging specifically a violation of 7 U.S.C. §2024(b)(1) (1994)).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The Government’s appeal was brought pursuant to 18 U.S.C. § 3731 (1994).

C. *The Plurality Opinion*

In a unanimous decision, the court held that the due process defense of outrageous governmental conduct lacked the requisite foundation in law and consequently should no longer be recognized as a valid defense in any Sixth Circuit proceeding. Although Judge Martin ultimately held that the outrageous governmental defense would not apply under the circumstances of this case, he did file a separate opinion to voice his support for the defense.⁶¹

The court began its survey of the outrageous governmental conduct defense where most inquiries of this kind begin, with entrapment. Following a discussion of *Sorrells* and *Sherman*, the court surmised that the Supreme Court has indicated a clear predilection for the subjective analysis of the entrapment defense.⁶² Accordingly, where a defendant's "predisposition to commit a particular crime was proved beyond a reasonable doubt, [he would] not [be permitted to] defend against prosecution on the basis that the government induced him to commit that crime, no matter how strong the inducement or 'outrageous' the government's conduct."⁶³

The court acknowledged that in another case, *United States v. Russell*,⁶⁴ the defendant proposed an argument for an entrapment defense based on constitutional principles of due process instead of congressional intent.⁶⁵ The *Russell* Court held, the Sixth Circuit continued, that the government's conduct did not violate an independent constitutional right.⁶⁶ Because the defense of entrapment lacked all constitutional foundation, the court failed to recognize any analogy to Fourth Amendment analyses.⁶⁷

In concluding that the *Russell* decision could not support the outrageous governmental conduct defense, the Sixth Circuit had to address Justice Rehnquist's concession, in dicta, of the defense's potential existence.⁶⁸ As an

⁶¹ *Id.* at 1429.

⁶² *Id.* at 1422.

⁶³ *Id.*

⁶⁴ 411 U.S. 423 (1973).

⁶⁵ *Tucker*, 28 F.3d at 1422.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1423.

⁶⁸ The court addressed it as follows:

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant

aid to this inquiry, the circuit court looked to Rehnquist's attempt to rectify the inherent inconsistencies within his position in his plurality opinion of *Hampton v. United States*.⁶⁹ His attempt, relegated to dicta by the facts of the case, failed to receive a majority because five Justices specifically refused to dismiss the defense altogether.⁷⁰

The court looked to its own opinion in *United States v. Leja*⁷¹ and concluded that the Sixth Circuit lacked substantial precedent to recognize the defense. As in *Russell*, the court in *Leja* refused to admit the due process defense absent an independent constitutional violation. Rather than rejecting the due process defense on a per se basis, the court held that "as long as the potential for abuse of individual rights exists,"⁷² the potential to invoke the due process defense must remain as a guarantor of these rights. The court emphasized that in over two dozen cases since *Leja*, the Sixth Circuit has refused to accept the due process defense "on the facts" in every case.⁷³ The *Tucker* court concluded, despite the repeated recognition (if not implementation) of the due process defense, that there was no authority in the Sixth Circuit upon which it could recognize a defense based on the Fifth Amendment. This defense would have provided Fifth Amendment protection against governmental conduct in inducing the commission of a crime, if outrageous enough, by prohibiting prosecution of an otherwise predisposed defendant.⁷⁴

case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

Russell, 411 U.S. at 431-32 (quoting *Kinsella v. United States*, 361 U.S. 234, 246 (1960)). This dicta has been cited more than two hundred times as authority for a defense based solely on an objective assessment of the government's conduct.

⁶⁹ 425 U.S. 484, 489 (1976) (plurality opinion). Justice Rehnquist further noted: "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the government activity in question violates some protected right of the *defendant*." *Id.* at 490.

⁷⁰ Two Justices in dicta (Powell and Blackmun) and three in dissent (Brennan, Stewart, and Marshall).

⁷¹ 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978).

⁷² *Tucker*, 28 F.3d at 1424 (citing *Leja*, 563 F.2d at 247).

⁷³ *Id.*; *see, e.g.*, *United States v. Barger*, 931 F.2d 359, 363-64 (6th Cir. 1991); *United States v. Qaoud*, 777 F.2d 1105, 1110-11 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir.), *cert. denied*, 461 U.S. 910 (1983); *United States v. Brown*, 635 F.2d 1207, 1213 (6th Cir. 1980).

⁷⁴ *Tucker*, 28 F.3d at 1424.

In addition, the Sixth Circuit conducted a survey of other circuits in search of authority for the defense.⁷⁵ The court acknowledged a general recognition of the defense among other circuits.⁷⁶ However, with one seemingly inconsequential exception,⁷⁷ a proper fact scenario never seemed deserving of the defense.

Moreover, the court assumed that the possible violation of separation of powers inherent in the defense,⁷⁸ along with the inescapable subjectivity of any "objective" determination of "outrageousness."⁷⁹ Both strongly support disowning the defense altogether.

After considerable discussion, the circuit court held that it was not required to recognize the due process defense.⁸⁰ Three final arguments sealed the matter for the plurality. First, any "government conduct which induces a defendant to commit a crime, even if labeled 'outrageous,' does not violate that defendant's constitutional right of due process."⁸¹ Second, "the district court lacked authority to dismiss the indictment for governmental misconduct where no violation of an independent constitutional right has been shown."⁸² Finally, "continued recognition of [the due process] defense stands as an invitation to

⁷⁵ *Id.* at 1425-26.

⁷⁶ *Id.*

⁷⁷ *Id.* (pointing to *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), as the exception). In *Tucker*, the court elaborated on the anomaly, stating that this decision was subsequently disavowed by the Third Circuit for improperly relying on *United States v. West*, 511 F.2d 1083 (3d Cir. 1975), which had been limited by *Hampton* and other Third Circuit opinions. See *United States v. Beverly*, 723 F.2d 11, 12 (3d Cir. 1983) (citing *United States v. Jannotti*, 673 F.2d 578, 610 n.17 (3d Cir. 1982) (en banc), *cert. denied*, 457 U.S. 1106 (1982)).

⁷⁸ *Tucker*, 28 F.3d at 1426.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1427. This argument is based on recognizing the close relationship of the entrapment defense to the "due process" defense. Since the Supreme Court has held that the entrapment defense finds its basis in legislative intent, as opposed to the Constitution, the Congress could decide to dismiss this defense. This would mean that even those defendants who were induced to commit a crime and who were not predisposed to commit that crime (generally protected by the current entrapment defense) could be convicted without violating due process.

⁸² *Id.* This conclusion is based on the Sixth Circuit's interpretation of *United States v. Payner*, 447 U.S. 727 (1980). The Supreme Court held in *Payner* that even if an unlawful search were so outrageous as to offend a fundamental fairness, "[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*." *Payner*, 447 U.S. at 737 n.9 (quoting *Hampton v. United States*, 425 U.S. 484, 490 (1976) (plurality opinion)) (alterations in original). From this, the court infers that the balance to be struck between government overreaching and the need to prevent lawlessness can only be found at predisposition, not "outrageousness."

violate the constitutional separation of powers, intruding not only on the province of the Executive Branch but the Legislative Branch as well.”⁸³ On this basis, the affirmative defense offered by the defendants in *Tucker* was rejected as a matter of law.⁸⁴ It was no longer necessary to determine whether, on the facts, the conduct of the government officials was “outrageous.”⁸⁵

D. Judge Martin’s Concurrence

It is important to note that Judge Martin, though concurring in the result, refused to reject the existence of the due process defense. He felt obligated to recognize it as a legitimate defense given the precedent within the Sixth Circuit. He even reiterated the Sixth Circuit’s test for determining outrageous conduct,⁸⁶ before conceding that in this particular case, the defense simply did not meet the test’s burden of proof to show that the conduct was outrageous.

V. IN SUPPORT OF THE OUTRAGEOUS GOVERNMENTAL CONDUCT DEFENSE

Justice Roberts argued in *Sorrells* that the doctrine of entrapment must be rooted “in the public policy which protects the purity of government and its processes”⁸⁷ which necessarily closes the courts “to the trial of a crime

⁸³ *Tucker*, 28 F.3d at 1427. The relevant question in this analysis is which branch should label and control “outrageous governmental conduct” with regard to criminal law enforcement. Because the *subjective* predisposition of the defendant crosses the threshold from society’s desire to prevent outrageous governmental conduct into society’s desire to punish those who commit crimes, the objective test should be rejected. The court concluded that unless a specific law is broken or a constitutional right is trampled, each court may only look to those factors provided by Congress, on the defendant’s predisposition.

⁸⁴ *Id.* at 1428.

⁸⁵ *Id.* at 1429 (Martin, J., concurring). Judge Martin’s concurrence reads more like a dissent: “I believe that this panel is bound by prior Sixth Circuit decisions recognizing the existence of an ‘outrageous government conduct’ defense, under the Due Process Clause of the Fifth Amendment, to criminal prosecution. I concur in the result, nevertheless, because the government’s conduct in the present case was not outrageous.” *Id.*

⁸⁶ The test has four factors:

- (1) the need for the police conduct as shown by the type of criminal activity involved,
- (2) the impetus for the scheme or whether the criminal enterprise preexisted the police involvement,
- (3) the control the government exerted over the criminal enterprise, and
- (4) the impact of the police activity on the commission of the crime.

Id.

⁸⁷ *Sorrells*, 287 U.S. at 455 (Roberts, J., separate opinion).

instigated by the government's own agents."⁸⁸ Justice Roberts continued by indicating that courts have "the inherent right . . . not to be made the instrument of wrong."⁸⁹ From this perspective, Justice Roberts does not find it necessary to decide between guilt and innocence; rather, the important issue is "the public policy which protects the purity of government."⁹⁰

Justice Frankfurter, in *Sherman*, continued this reasoning by arguing that to ensure the objective regulation of law enforcement conduct in apprehending those "ready and willing to commit crime," an analysis of the predisposition of the accused would fail to ascertain the reasonableness of the police conduct.⁹¹ The proper focus can only be on the conduct of the government agents.⁹² Frankfurter concluded that it was not the function of government "to promote [crime, but] rather [to] detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. . . . Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."⁹³

Both Justices Roberts and Frankfurter base their positions on a crucial element, the recognition that the threat posed to the integrity of both the criminal law and the judicial process is found in the conduct of the government, not the actions of the defendant.⁹⁴ At the base of this theory is the notion that judicial authority should not be used for the enforcement of the criminal law by means that are unjust.⁹⁵ This theory is grounded in the policy of judicial integrity.⁹⁶ The goal is similar to those instituted by the *Federal Rules of Evidence*: it is better to set a criminal free, so long as the laws that justify the system maintain their integrity.⁹⁷ It is crucial to remember that the laws of this

⁸⁸ *Id.* at 459.

⁸⁹ *Id.* at 456.

⁹⁰ *Id.* at 455.

⁹¹ *Sherman*, 356 U.S. at 384 (Frankfurter, J., concurring in the result).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 385; *Sorrells*, 287 U.S. at 457.

⁹⁵ *Sorrells*, 287 U.S. at 456-58 (Roberts, J., separate opinion).

⁹⁶ See *United States v. Russell*, 411 U.S. 423, 445 (1973) (Stewart, J., dissenting); *Sherman*, 356 U.S. at 380, 385 (Frankfurter, J., concurring in the result); *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 353 (1967); *id.* at 470 (Holmes, J., dissenting).

⁹⁷ FED. R. EVID. 102. This idea is most easily exemplified by comparing the standard of persuasion necessary for conviction in a criminal case to the standard required in most civil cases. In most civil cases, the standard of proof by a preponderance of the evidence indicates a policy decision which would allow any case to turn on a finding of 51%-49% in favor or against any party. However, in criminal cases, the standard of proof beyond a reasonable doubt is notably more demanding. This standard represents a policy decision in favor of risking the acquittal of a defendant who is more than likely guilty of the crime for

country were designed to protect all of us—the innocent as well as the guilty—from rule by tyranny.⁹⁸ This standard stems from one of the most basic precepts of the American legal institution, that we live under “a government of laws, and not of men.”⁹⁹

The administration of the criminal law has been described as the “most awesome aspect of government.”¹⁰⁰ Consequently, a clear signal of an advanced and well-adjusted society is a sophisticated, yet highly impartial, system of criminal law enforcement. Of manifest importance, government agents should not themselves become criminals as they seek, no matter how reasonable or praiseworthy, to fight crime.¹⁰¹ From these authorities, the conclusion may be drawn that a preeminent duty of government in a progressive society, from both a legal and moral standpoint, is to enforce its criminal laws within strict boundaries of justice and fairness, cognizant always of the approved standards of conduct.

A serious discussion of entrapment and the due process defenses cannot ignore the ever-rising tide of sophisticated, as well as concealed, crime.¹⁰² To combat these increasingly dire circumstances, the police are forced to turn to clandestine investigation methods of their own, utilizing informants and undercover agents wherever possible.¹⁰³ Subsequently, the defense of entrapment may not call for the cessation of legal proceedings where the government resorted to deceit¹⁰⁴ or obtained “evidence by artifice or deception.”¹⁰⁵

Although a modern law enforcement agency cannot ignore the usefulness of covert operations in their battle to keep pace with sophisticated crime networks, the fact remains that a democratically functioning government must acknowledge definite constraints on these powers. The courts must be prepared

which he is charged. So long as the evidence raises just enough doubt in a juror's mind that one element of the crime has not been fulfilled, his acquittal is secured.

⁹⁸ Cf. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (stating that the Fourth Amendment's prohibition of unreasonable searches and seizures “protects all, those suspected or known to be offenders as well as the innocent”).

⁹⁹ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

¹⁰⁰ *Pennekamp v. Florida*, 328 U.S. 331, 356 (1946) (Frankfurter, J., concurring).

¹⁰¹ See also *Sherman*, 356 U.S. at 372 (majority opinion) (stating that although it is the function of law enforcement to prevent crime and apprehend criminals, “[m]anifestly, that function does not include the manufacturing of crime”).

¹⁰² See *Hampton v. United States*, 425 U.S. 484, 496 (1976) (Powell, J., concurring in the judgment).

¹⁰³ See *Sherman*, 356 U.S. at 372; *Sorrells*, 287 U.S. at 453–54 (Roberts, J., separate opinion).

¹⁰⁴ *Russell*, 411 U.S. at 435–36.

¹⁰⁵ *Sorrells*, 287 U.S. at 454 (Roberts, J., separate opinion).

to define these boundaries, providing law enforcement agencies with guidelines as to when "enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive [to due process] whether the method used is refined or crude, subtle or spectacular."¹⁰⁶ When this boundary has been crossed by any method of official conduct, due process must step in, as is its purpose, to prevent any "prosecution conceived in or nurtured by such [outrageous] conduct."¹⁰⁷

For Justice Holmes, the fact that evidence would be excluded for having been obtained by unconstitutional means seemed to provide for the logical extension of inadmissibility for having been obtained by illegal acts of government agents.¹⁰⁸ This approach is yet another expression of the American criminal law principle that it is better to choose as "a less[er] evil that some criminals should escape than that the Government should play an ignoble part."¹⁰⁹

A. *The Due Process Defense Differentiated from Entrapment*

The function of the due process defense is to place both federal and state law enforcement agencies under a uniform duty to satisfy certain standards of decency and fair play in their investigation and apprehension of criminals.¹¹⁰ Although the due process defense is "a close relative of entrapment," it is independent.¹¹¹ The unique structure of this defense, bound by the Constitution, will require uniform application to all suspects: the innocent, the guilty, and the criminally predisposed. This application will resolve and displace the deficiencies of the subjective analysis for entrapment.

The most important discrepancy between the entrapment and due process defenses is the availability to those criminally predisposed. In addition, the due process defense provides protections beyond those provided by entrapment¹¹²

¹⁰⁶ *Williamson v. United States*, 311 F.2d 441, 445 (5th Cir. 1962) (Brown, J., concurring specially), *overruled by* *United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987).

¹⁰⁷ *People v. Isaacson*, 378 N.E.2d 78, 83 (N.Y. 1978).

¹⁰⁸ *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

¹⁰⁹ *Id.*

¹¹⁰ *Sherman*, 356 U.S. at 384.

¹¹¹ *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983).

¹¹² *See United States v. Jannotti*, 673 F.2d 578, 606 (3d Cir.) (en banc) (stating that "a successful due process defense must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense"), *cert. denied*, 457 U.S. 1106 (1982).

by reaching “[p]olice overinvolvement in crime [which attains] a demonstrable level of outrageousness”¹¹³ that will agitate a sense of justice.

B. *Constitutional Authority*

Due process, as a restraint on the power of government to use the judiciary as a tool to enforce the criminal code, has been sanctioned as early as the *Magna Carta*.¹¹⁴ Archetypal of this standard is when government agents brutalize a defendant in order to obtain evidence to aid in his conviction. This type of activity clearly goes beyond offending “some fastidious squeamishness or private sentimentalism about combating crime too energetically.”¹¹⁵ Rather, “[t]his is conduct that shocks the conscience.”¹¹⁶ A conviction supported by this evidence would offend our sense of justice and fair play, crucial components of our society.

C. *Application of the Defense*

The *Tucker* court argues that the fine lines that must be drawn when the predisposition of the accused is ignored in favor of an assessment of the government agent’s conduct will create insurmountable practical difficulties.¹¹⁷ It is conceded that this argument raises legitimate issues, however, it must be kept in mind that at stake is a delineation of fundamental rights as they exist at particular times, places, and within particular contexts. This is a responsibility which the Constitution’s founders must have had in mind when they provided for the creation of a federal judiciary. The issue of whether specific governmental conduct violates due process must turn on “the totality of the circumstances with no single factor controlling.”¹¹⁸ We cannot, nor should we, expect this analysis to provide a “precise line of demarcation or calibrated measuring rod with a mathematical solution.”¹¹⁹

The courts are uniquely equipped to sift through the competing interests of the government (to detect and punish criminals) and of individuals (to be treated fairly within a framework of justice and decency). The judiciary stands as the most qualified branch of government to make these difficult decisions. A

¹¹³ *Hampton*, 425 U.S. at 495 n.7 (1976) (Powell, J., concurring in the judgment).

¹¹⁴ *People v. Isaacson*, 378 N.E.2d 78, 82 (N.Y. 1978).

¹¹⁵ *Rochin v. California*, 342 U.S. 165, 172 (1952).

¹¹⁶ *Id.*

¹¹⁷ *Tucker*, 28 F.3d at 1426 (referring to the unavoidable subjectivity to which any purportedly objective assessment of “outrageousness” must devolve).

¹¹⁸ *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981); *Isaacson*, 378 N.E.2d at 83.

¹¹⁹ *Isaacson*, 378 N.E.2d at 83.

defendant who has been victimized by police misconduct that involves government participation in criminal activity to an unconscionable degree¹²⁰ should be able to resort to the courts and the due process or outrageous police conduct defense.

It is possible to develop guidelines for application of the defense which will promote its uniform application. Factors worth consideration include: (1) a dominant motive by the police to secure the conviction, without regard for normal procedure; (2) tenacious efforts by the police to wear down the resistance of the suspect, thus inducing the suspect into criminal activity he otherwise would not have pursued; and (3) the control of criminal activity by government agents that unreasonably exceeds the level of activity necessary to detect and contain criminals.¹²¹

Justice Rehnquist suggests that any police officer engaging in such illegal activity or other activity outside the scope of duty be prosecuted under applicable federal or state law.¹²² This simply is not adequate. There are two independent elements at work: vindication of the Constitution and preservation of the judicial system itself.¹²³ Beyond the constitutional issues lies the goal of "the purity of [the courts'] own temple."¹²⁴ Simply prosecuting the police under a separate statute will not preserve this fundamental element of the American judicial system. Once a government agent commits an act that is repugnant to the principles embedded in the Due Process Clause, the issue has gone beyond retribution against the officer. Instead, it is the respect for the criminal law system and the faith in the protections provided by the Constitution that deserve foremost attention.

VI. THE DUE PROCESS DEFENSE AS AN INDEPENDENT PROTECTION FROM GOVERNMENT-INDUCED CRIMINALITY

The Supreme Court, in *United States v. Russell*,¹²⁵ implied through dictum the existence of the due process defense.¹²⁶ In so doing, the Court supported

¹²⁰ *Id.*

¹²¹ *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983); *Isaacson*, 378 N.E.2d at 83.

¹²² *Hampton*, 425 U.S. at 490.

¹²³ *Sorrells*, 287 U.S. at 457.

¹²⁴ *Id.*

¹²⁵ 411 U.S. 423 (1973).

¹²⁶ *Id.* at 431-32 (hypothesizing that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . .").

this proposition by citing *Rochin v. California*,¹²⁷ which involved the forcible extraction of evidence—by way of a stomach pump—from the defendant's body by methods that "shock[ed] the conscience"¹²⁸ of the Court.

In *United States v. Archer*,¹²⁹ the Government argued that the reference in *Russell* to *Rochin* confirmed that the Supreme Court perceives the due process defense as one limited to conduct which shocks the conscience of a court and directly infringes on the rights of a defendant.¹³⁰ The Second Circuit did not find it necessary to answer this question since the dispute in *Archer* could be resolved on other grounds. Nonetheless, the court seemed to adopt a broader application of the defense—a general due process right "of citizens to be free from government-induced criminality"¹³¹—than that proposed by the Government.¹³²

The Supreme Court has taken only one opportunity, *Hampton v. United States*,¹³³ to address the limits of the due process defense. In *Hampton*, a plurality of the Court appeared to implicitly reject the defense, limiting its application to direct infringements of the rights of defendants.¹³⁴

The *Tucker* court argues that the effect of requiring direct infringement of the rights of defendants before the defense is triggered effectively dismisses the defense from consideration.¹³⁵ There are two compelling arguments in support of continued recognition of the defense. First, it is clear that the plurality in *Hampton* did not intend to deprive the accused of all protection. However, by disposing of the due process defense altogether, this would certainly be the indirect effect. This is the case because it is difficult, if not impossible, to imagine police conduct which would infringe on a *separate right* of a defendant already predisposed to committing the crime for which he is accused. Note that his predisposition alone will deprive him of the entrapment defense under current federal practice.¹³⁶

Second, in *Rochin*,¹³⁷ it is clear that Justice Frankfurter did not base his decision to reverse the conviction of the defendant on a separate protected right of the defendant.¹³⁸ Instead, he went to great lengths to describe his abhorrence

¹²⁷ *Id.* at 432 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

¹²⁸ *Rochin*, 342 U.S. at 172.

¹²⁹ 486 F.2d 670 (2d Cir. 1973).

¹³⁰ *Id.* at 676.

¹³¹ *Id.* at 677.

¹³² *Id.*

¹³³ 425 U.S. 484 (1976).

¹³⁴ *Id.* at 490.

¹³⁵ *Tucker*, 28 F.3d at 1423.

¹³⁶ See *Sherman*, 356 U.S. at 373; *Sorrells*, 287 U.S. at 451.

¹³⁷ 342 U.S. 165 (1952).

¹³⁸ *Id.* at 170.

of the police conduct in the process of obtaining the evidence.¹³⁹ Though certainly the privacy of the defendant had been severely compromised, it was the repugnant conduct of the police to which he concluded that "force so brutal and so offensive to human dignity in securing evidence from a suspect" offended due process.¹⁴⁰ Because it would have been easy for the Court to have decided this case solely on privacy grounds, the fact that a due process approach was adopted seems to clearly indicate that *Rochin* endorsed a due process right of the individual to be free from outrageous governmental conduct in the area of criminal law enforcement.

Tucker illustrates an important misinterpretation of the *Hampton* decision: due process does not exist simply to protect other "independent" rights, but is instead a right in and of itself. It functions for all persons to provide the "most comprehensive protection of liberties . . ."¹⁴¹ The functioning of due process, including its guarantees of fairness in relations between the government and individuals, does not require any separate violation of rights by police misconduct.

It is worth noting, and expanding upon, that the *Tucker* court conceded that *Hampton* was by no measure the death knell for the due process defense.¹⁴² In fact, the numbers would seem to indicate a fairly strong approval for the defense.¹⁴³ This case provided an opportunity for the Supreme Court to broach the subject of the due process defense as applied to a criminally predisposed defendant.

Writing for a plurality in *Hampton*, Justice Rehnquist revisited his comments in *Russell* which suggest that the due process defense was alive and well.¹⁴⁴ By definition, the due process defense would apply in a like manner to both the criminally predisposed and those mentally coerced into criminal activity. However, Rehnquist and the plurality retreated from this supposition, proposing instead that the sole protector of the accused would be the

¹³⁹ *Id.* at 166-67.

¹⁴⁰ *Id.* at 174.

¹⁴¹ *Id.* at 170.

¹⁴² *Tucker*, 28 F.3d at 1423.

¹⁴³ The Court divided on the issue of a due process defense. The plurality, composed of three Justices (Rehnquist, Burger, and White) apparently rejected the due process defense for a predisposed defendant, without regard to the nature of the governmental misconduct. Five Justices (Powell, Blackmun, Brennan, Marshall, and Stewart) would permit a due process defense when government agents participate in a crime which "reach[es] a demonstrable level of outrageousness" *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring in the judgment).

¹⁴⁴ *Id.* at 489-90.

entrapment defense.¹⁴⁵ Under the subjective analysis, predisposition is fatal to the entrapment defense.¹⁴⁶

In so doing, Rehnquist closed the door that he had opened in *Russell*. The opportunity to plead the due process defense provided in *Russell* was eliminated when Rehnquist declared that the defense's "limitations" are triggered only by governmental misconduct which "violates some protected right of the defendant."¹⁴⁷ In the absence of such a violation, illegal or outrageous activity of a governmental agent should not be handled by dismissing the cause of action against a culpable defendant, but by leveling separate charges against the agent.¹⁴⁸ Arriving at this conclusion apparently renders due process as adversely affected by predisposition as the entrapment defense.¹⁴⁹

However, in a concurring opinion, Justices Powell and Blackmun took exception to the plurality's objective of denying a due process defense to any predisposed defendant.¹⁵⁰ Justice Powell, the author of the separate opinion, grounded this decision in light of the fact that neither *Russell* nor any other case involving entrapment required such a holding.¹⁵¹ Nor, he argued, had the Supreme Court confronted the issue in any form other than "contraband offenses."¹⁵² Under these conditions, Powell refused to conclude "that an analysis other than one limited to predisposition would never be appropriate under due process principles."¹⁵³

Justice Powell was cognizant of the hazards involved in setting standards of conduct for other governmental agencies. However, he did not believe that "these difficulties . . . justifi[ed] the plurality's absolute rule."¹⁵⁴ Fundamental fairness will be at the core of these decisions, and the Supreme Court's cases were "replete with examples of judgments as to when such fairness has been denied an accused in light of all the circumstances."¹⁵⁵ In concluding, Powell reiterated that the absence of a "sharply defined standard against which to make these judgments [was not] a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances."¹⁵⁶ The conduct will be more readily identified by creating a standard which requires "[p]olice

¹⁴⁵ *Id.* at 490.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *United States v. Twigg*, 588 F.2d 373, 377-79 (3d Cir. 1978).

¹⁵⁰ *Hampton*, 425 U.S. at 495.

¹⁵¹ *Id.*

¹⁵² *Id.* at 493.

¹⁵³ *Id.* (footnote omitted).

¹⁵⁴ *Id.* at 494 n.6.

¹⁵⁵ *Id.* at 494-95 n.6.

¹⁵⁶ *Id.* at 495 n.6.

overinvolvement in crime . . . [which will] reach a demonstrable level of outrageousness before it could bar conviction."¹⁵⁷

In addition to promoting the objective test for entrapment, the dissent agreed that the due process defense had not been extinguished by the *Russell* decision.¹⁵⁸ Because Justice Stevens did not participate in the decision, the number of Justices actively opposed to the due process defense was limited to three.

VII. CONCLUSION

When defining the degree of misconduct necessary to trigger the due process defense, the courts must take care not to nullify its effectiveness¹⁵⁹ by requiring overly oppressive measures. It is simply unreasonable to conclude that Justice Powell meant to equate "[p]olice overinvolvement in crime [that] . . . reach[ed] a demonstrable level of outrageousness"¹⁶⁰ solely to police brutality. In modern day society, police must be creative in their crime fighting methods. Government agents more often coerce criminal activity by promises of profit or advantage than by physical persuasion. In the same light, government involvement in the planning, execution, and control of crime can become unconstitutionally intrusive without ever attaining the level of brutality involving "physical or psychological coercion that 'shocks the conscience.'"¹⁶¹ Criminal activity, by its very nature, will take place in secret and prove difficult to detect. To counter it, we fully anticipate the need for law enforcement agencies to resort to "stealth and strategy" as "necessary weapons in [their] arsenal"¹⁶² At the same time, these agents and the courts must keep in mind that marginal involvement in crime is not the same as creation, control, and direction of that same crime.

The entrapment defense, whether applied with the subjective methodology favored by the Supreme Court, or objective methodology favored by many state courts, is incapable of serving the same goals as the due process defense. The subjective test fails to protect the defendant who is predisposed to a crime, but has been the victim of police misconduct which shocks the conscience of the court. The objective test fails because the doctrine simply is not as

¹⁵⁷ *Id.* at 495 n.7.

¹⁵⁸ Justices Brennan, Stewart, and Marshall. *Id.* at 495.

¹⁵⁹ *Rochin*, 342 U.S. at 172 (comparing the misconduct necessary to implementation of a "rack and the screw").

¹⁶⁰ *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring in the judgment).

¹⁶¹ *United States v. Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir.) (Ginsburg, J., separate opinion), *cert. denied*, 464 U.S. 908 (1983).

¹⁶² *Sherman*, 356 U.S. at 372.

expansive in its application as the due process defense. It does not protect a suspect from police misconduct which offends the notions of decency and fair play. Ultimately, the due process defense exists, not for the protection of the defendant, but to protect the fundamental maxims of the Constitution and the integrity of the judiciary.¹⁶³

¹⁶³ United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983) (per curiam).

